IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 27

BURLINGTON TRUCK LINES, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

Certificate of Service Appended at Page 29.

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OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31 (1961). A copy of the opinion appears in the printed record (R. 209). The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599 and is in the printed record (R. 99).

JURISDICTION.

This suit was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 27, 1961, and the Notice of Appeal was filed in that Court by

Appellants on June 23, 1961. The jurisdiction of the Supreme Court to review the District Court's decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

STATUTES INVOLVED.

Sections 204(c), 207(a), 210a and 212(a) of the Interstate Commerce Act (49 U. S. C. 304(c), 307(a), 310a and 312(a)) and Section 703 of the Labor-Management Reporting and Disclosure Act of 1959, Section 8(c), 73 Stat. 519, 29 U. S. C. 158(c).*

QUESTIONS PRESENTED.

1. Whether temporary service interruptions involving the interchange of freight between non-union motor carriers operating in interstate commerce wholly within the State of Nebraska, and some, but not all, union interstate motor carriers in a particular area arising out of a labor dispute may, consistently with the standards set forth in the Interstate Commerce Act (49 U. S. C. 201 *et seq.*) and the National Transportation Policy, be made the basis for the grant by the Interstate Commerce Commission of permanent operating authority to a non-union carrier in that area.

2. Whether the Commission erroneously used the grant of additional permanent operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) where the appropriate remedy, if any, was a proceeding under Sections 204(c) and 212 of the Interstate Commerce Act (49 U. S. C. 304(c) and 312) to compel the particular carriers to comply with their obligations under their certificates of public convenience and necessity.

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*These statutory provisions are reprinted in Appendix A.

STATEMENT OF FACTS.

This controversy had its origin in the attempt of Local 554 of the International Brotherhood of Teamsters, early in 1954, to organize the employees of the twelve carrier stockholders of Nebraska Short Line Carriers, Inc., the successful applicant before the Commission and one of the appellees in this proceeding. The stockholder carriers, who are not unionized, operate in interstate commerce entirely within Nebraska and use Omaha as the principal point at which traffic moving from and to points outside of Nebraska is interchanged with unionized interstate carriers, many of whom are appellants in this proceeding. When its organizational activities directed at the Nebraska carriers proved unsuccessful, the Union in 1956 began to exert pressure upon the unionized interstate carriers in an effort to restrict the interchange of freight with the non-union Nebraska carriers at Omaha and some other less important Nebraska interchange points.

The unionized interstate carriers have collective bargaining agreements with the Union which in 1956 contained the "hot cargo" clause customary at the time, providing that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle freight produced or tendered by any person who was engaged in any labor dispute with the Union. The clause further provided that the union and its members, either individually or collectively, reserved the right to refuse to handle goods from or to any firm or truck engaged or involved in any controversy with a union and reserved the right to refuse to accept freight from, or to make pick-ups from, or to make deliveries to establishments where picket lines, strikes, walk-outs or lock-outs existed (R. 103). After May, 1956, as a result of union pressure to effectuate the objectives of the hot cargo clauses, some of the Ne-

braska carriers experienced interchange difficulties with some, but not all, of the interlining carriers. Accordingly, in June of 1956, the Nebraska carriers organized a Nebraska corporation—Nebraska Short Line Carriers, Inc.—for the purpose of operating in interstate commerce as a motor common carrier of general commodities. The assumption was that if Short Line could obtain a certificate of public convenience and necessity from the Commission, and could operate as a non-union carrier, the Nebraska carriers would no longer need to interchange freight with unionized carriers at Omaha.

On June 22, 1956, Short Line filed its first application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067, authorizing operations in interstate commerce between Denver and Chicago, Omaha and Chicago, Minneapolis and Des Moines, and Council Bluffs, Iowa and St. Louis, over regular routes serving intermediate points. By an order dated September 3, 1957, Examiner Donald R. Sutherland of the Interstate Commerce Commission recommended denial of this application (R. 18). On January 10, 1957, Short Line filed its second application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067 (Sub No. 2), authorizing operation by it in interstate commerce between Omaha, Nebraska on the one hand, and thirty-two states, on the other. By an order dated August 8, 1957, Examiner Michael B. Driscoll recommended denial of this application (R. 77).

Although the applications were heard on separate records before different Examiners, the Interstate Commerce Commission dealt with them in a single report dated June 1, 1959 (79 MCC-599, R. 99). Examiner Sutherland's decision was reversed in part and affirmed in part. The Commission granted a certificate to Short Line, author-

izing operations "between Omaha on the one hand, and on the other, Chicago, St. Louis and Kansas City, restricted to traffic originated at or destined to points in Nebraska" (R. 118). Examiner Driscoll's recommended report and order was affirmed, and the application filed in MC-116067 (Sub No. 2) was denied. Since December 4, 1956, Short Line has had authority to operate between Omaha and Chicago, St. Louis and Kansas City, pursuant to a temporary certificate granted by the Commission under 49 U. S. C. Sec. 310a.

After the Commission's grant of permanent authority to Short Line, appellants brought a timely action in the District Court to set aside the order. The three-judge District Court upheld the Commission's order and dismissed the complaint, with Judge Mercer dissenting.

The facts as stated by the Examiners in their respective reports are significant because they were adopted by the Commission. Referring to Examiner Sutherland's findings, the Commission stated:

> "There is no serious dispute as to the facts. An examination of the record establishes that the pertinent facts are accurately and adequately stated in the report which accompanied the Examiner's recommended order, and we shall adopt such statement as our own, confining our discussion herein to the issues presented by the exceptions and the replies thereto" (R. 107).

Referring to findings of Examiner Driscoll, it stated:

> "The pertinent facts of record are adequately stated in the report which accompanied the Examiner's recommended order and we adopt such statement as hereinafter augmented or modified as our own" (R. 110-111).

As a result of the fact that the Commission has adopted the findings of its Examiners, it will be proper to refer to the Examiners' findings as those of the Commission.

Both Examiners found that appellants Burlington and Santa Fe provided uninterrupted service at all times. These findings were adopted by the Commission (R. 54, 55, 82). Burlington serves all of the points embraced within the certificate issued to Short Line (R. 52). Santa Fe is authorized to engage in the transportation of general commodities to, from and between points in Arkansas, Colorado, Kansas, Missouri, Nebraska, New Mexico, Oklahoma and Texas.

Thus, the facts show, on the basis of specific findings by the Commission, that at least two of the appellants provided continuous service at all times to and from the points Short Line received authority to serve. The facts further show, on the basis of the Commission's adoption of Examiner Driscoll's finding that prior to the hearing on the second application, specifically on or about April 3, 1957, Watson, Prucka Transportation, Inc. (predecessor to Interstate Motor System, Inc.), and Independent Truckers, Inc. resumed normal interchange practices at Omaha (R. 94). By adopting the Examiner's findings the Commission acknowledged, as a matter of fact, that there were no interruptions in the service of two carriers and that three others, Watson, Prucka and Independent Truckers, resumed normal operations on or about April 3, 1957 which was more than two years before the Commission's decision.

SUMMARY OF ARGUMENT.

1. The Commission in granting this permanent certificate of operating authority has violated the fundamental objectives and statutory standards of Part II of the Interstate Commerce Act. The certificating provisions of the statute are designed to achieve a long range balance between the demand for, and supply of, transportation services, so as to avoid both the crippling effects of under-

supply, and the destructive tendencies of over-capacity. Such a balance cannot be achieved if permanent certifications are based, as this one was, upon the transitory circumstances of particular labor disputes. Moreover, the evidentiary findings which the Commission adopted established that even at the height of the interchange difficulties experienced as a result of the labor dispute, there were adequate alternative facilities available and that these alternatives were increasing as more of the unionized interlining carriers found that they could successfully resist union pressure. Consequently, in granting a certificate designed solely to insure against the recurrence of interchange difficulties arising from a labor controversy, the Commission ignored its own normal standards for the administration of section 207(a), calling for an evaluation of the adequacy of existing services and the effect of a new service upon existing carriers. In so doing, the Commission in effect substituted an ill-informed judgment with respect to labor considerations outside its special competence for an informed judgment with respect to transportation considerations within its special competence and relevant to its own statutory objectives.

2. The Commission also erred in rejecting the suggestion that a more appropriate remedy, if any was required under the Interstate Commerce Act, would be a complaint proceeding under section 204(c) of the Act. An order entered in such a proceeding would have strengthened the position of those unionized carriers who were already doing everything within their power to resist union pressure and would have penalized only those carriers who the Commission found had not made an earnest effort to provide interlining services with non-union carriers. Such a remedy would also have avoided the anomalous result of permanently certificating new transportation services in an area where existing services were already more than

adequate to meet normal needs. Finally, the Commission's own previous experience with similar situations indicated the appropriateness of a complaint proceeding and a cease and desist order to guard against the recurrence of transportation difficulties arising from secondary boycotts in labor disputes. The Commission's summary rejection of the suggestion that the non-union carriers be remitted to this alternative remedy was therefore without rational justification and was an abuse of its discretion under the Interstate Commerce Act.

ARGUMENT.

I.

THE COMMISSION VIOLATED RECOGNIZED STANDARDS FOR THE ADMINISTRATION OF THE CERTIFICATING PROVISIONS OF THE INTERSTATE COMMERCE ACT (207(a)) BY ISSUING A PERMANENT GRANT OF OPERATING AUTHORITY IN ORDER TO ELIMINATE TEMPORARY INTERCHANGE DIFFICULTIES RESULTING FROM A LABOR DISPUTE.

The order of the Commission in this case is unique in the history of the administration of the certificating provisions of Part II of the Interstate Commerce Act. This uniqueness arises not only from the fact that the Commission undertook to relieve certain non-union motor carriers from the temporary embarrassment of unionizing pressures by a permanent grant of operating authority in interstate commerce to their chosen instrument, a wholly-owned subsidiary, committed to non-union operations. Even more important to the responsibilities of this Court is the fact that the Commission in providing this remedy completely ignored the standards for the administration of section 207(a) of the Act which the Commission itself has developed and which the Courts have uniformly sustained. It is this departure from the normal standards of administration in order to correct a temporary situation which the Commission mistakenly believed could not otherwise be corrected that requires the emphatic disapproval of this Court.

Early in its administration of Part II of the Interstate Commerce Act, the Commission formulated the standards which it proposed to follow in determining public conve-

nience and necessity under section 207(a). In *Pan American Bus Lines*, 1 M. C. C. 190 (1936), the Commission, elaborated the controlling tests in the following passage:

> "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." (p. 203.)

Of course, it would be disingenuous to assert that the Commission has always achieved or even approached perfect consistency in the application of these tests. Nevertheless, the Commission has never avowedly discarded them and has in recent years successfully defended its determinations by resort to substantially the same basic principles. *Filson* v. *I. C. C.*, 182 F. Supp. 675; *Associated Transports Inc.* v. *United States*, 169 F. Supp. 769. See, too, *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153. And certainly, rarely, if ever, has the Commission so flagrantly departed from those principles, as it did in attempting to meet what it erroneously regarded as the peculiar exigencies of this particular situation.

In order to appreciate the full extent of the Commission's departure from normal standards for administering section 207(a) of the Act, it is necessary to compare in some detail the evidentiary findings of the Examiners, which the Commission adopted as its own, with the ultimate conclusions which the Commission substituted in place of those of the Examiners. The evidentiary findings of Examiner Sutherland detailed the difficulties which some of the stockholder carriers had experienced in interchanging freight with some of the unionized carriers, particularly at the Omaha Gateway. These findings also detailed how some

of the shippers or consignees served by the unionized carriers had suffered either in delayed service or in additional charges on account of these difficulties. However, in every instance where the Examiner found that one of the stockholder carriers had experienced interchange difficulties or suffered financially because some of the interlining carriers were routing incoming freight over a different line, the Examiner also found that the same Nebraska carriers were able to interchange freely with other unionized carriers, particularly Burlington, Santa Fe Trail, Bos Truck Lines, D. M. T. and National Carloading, serving the same area (R. 22, 23, 24, 25, 27, 28). Similarly, in substantially every case where delays or extra expenses had resulted from rerouting of traffic normally handled by the stockholder carriers, the Examiner also found that the shipper or consignee would have no objection if the goods were originally shipped via the unionized carriers who were interchanging freely with the stockholder carriers (R. 30, 36, 40, 41, 42, 45, 46). It was on the basis of these detailed evidentiary findings that Examiner Sutherland made his crucial ultimate findings in the following passage:

> "As previously indicated, there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that the real parties in interest who are aggrieved by this practice should file a complaint with this Commission under Part II of the act. In any event, since no complaint has been filed by any of applicant's stockholders with this agency, the Commission has not had an opportunity to test the effectiveness of that procedure. Certainly, it cannot be assumed that the Commission's procedure thereunder would be ineffectual. Although applicant cites the *Planters Nut* case, *supra*, [31 M.C.C. 719] to sustain its argument that additional motor carrier authority is needed to correct the situation, it should be borne in mind that that was a complaint case and the Commission issued an order re-

quiring certain specified carriers to cease and desist from certain interchange practices found to be unlawful. In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and, if a certificate is granted on the evidence herein those protesting carriers who have been continuing to interchange normally would be injured along with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions of the routes involved and the shipments are moving through to destinations" (R. 68-69).

Examiner Driscoll also found substantial indications that more of the unionized carriers would soon manage to interchange freely at the Omaha Gateway with the non-union carriers. He elaborated this finding in the following passage:

"* * * Most of the carriers serving Omaha have terminals there, and many of those are large carriers, operating large, or relatively large, fleets of equipment. Most of those carriers admit some difficulties in handling jointline freight with eastern Nebraska carriers, but all of them insist that, if conditions were normal, they could and would provide good interchange service and good highway service. All of them declare that, except for conditions not due to their initiative nor desire, they have been ready, able and willing to provide service for all traffic offered by shippers or connecting carriers. For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy

is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers. It was explained that, where picket lines exist, there might still be difficulties in interchanging traffic in the usual and normal methods of interchange. All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline carriers will strive to restore to normal their carrier relationships and interchange practices at Omaha." (R. 94.)

As compared with these detailed evidentiary findings and careful evaluations of the total picture, the Commission expressly adopted the detailed findings and then substituted its own evalution of the total situation in the following passage:

"The breakdown in interchange arrangements at Omaha between the unionized carriers and the stockholder-carriers and the refusal of the unionized carriers to provide pickup and delivery service at establishments where picket lines have been established has resulted in a substantial disruption in motor service to a large portion of the Nebraska shipping public, and the responsibility for the service deficiencies shown to exist must be laid at the doors of the unionized carriers which preempted their obligations to the public. We do not hold that all instances of refusal to provide services are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and

adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers. The apprehensions of certain of the organized carriers that any opposition to the demands of the Union would have resulted in reprisals against them appear greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc., changed its policy against interchange with "unfair" carriers before the close of the hearings herein without experiencing any difficulty. The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by the mere acquiescence in the boycott, the unionized carriers lose the protection which section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby." See *Carpenters' Union v. Labor Board*, 357 U. S. 93. (R. pp. 116-117.)

The preceding paragraph is the principal explanation offered by the Commission for overruling the recommendations of Examiner Sutherland. It will be noted that the Commission gave no consideration at all to the extent to which interchange difficulties could have been avoided by the use of those unionized carriers who continued to interchange freely with the stockholder carriers. It should also be remembered that all the points involved in the certificate granted were served by the freely interchanging carriers, such as Burlington and Santa Fe Trail. There is no indication at all in the record that these carriers could not have handled all the freight that was available if shippers and the non-union carriers had routed the traffic over their lines. There was, on the other hand, ample evidence, as

Examiner Sutherland found, that the unionized motor carriers were not being operated to capacity, that they were interested in transporting additional traffic, and that they would be injured by the grant of a new authority to an additional carrier (R. 54). These considerations, taken together with the fluidity of the labor situation, convinced Examiner Sutherland that, even if some remedy was appropriate, it was not a situation justifying the grant of a new operating certificate. The Commission, on the other hand, gave no explanation of how its ultimate opposite conclusion could be reconciled with the evidentiary findings.

This fatal contradiction between the evidentiary findings adopted by the Commission and its own ultimate conclusion was aptly summarized by Judge Mercer in the following passage of his dissenting opinion:

> "We are not here confronted with a mere failure to find, expressly, that the existing carrier facilities and service capabilities are inadequate. What we are confronted with are findings of fact adopted by the Commission which led to only one conclusion, namely, that existing carrier facilities and service capabilities are adequate. In my opinion, the ultimate finding of public convenience and necessity for granting the Short Line operating rights is diametrically opposed to those basic findings of fact." (R. 263.)

The Commission's reasoning is all the more difficult to follow, because of its failure to appreciate the significance, for the underlying labor difficulty, of this Court's decision in *Local 1976 v. N. L. R. B.*, 357 U. S. 93 (1958), holding that union efforts to enforce hot cargo clauses, identical to those involved in the present case, were unlawful under the National Labor Relations Act. In taking note of that decision, the Commission chose only to emphasize the qualification that voluntary observance of the hot cargo clause by an employer, without union coercion, would not itself be a violation of the Labor Act (R. 117). In so doing, the

Commission seems to have entirely ignored the basic principle of the decision, which was especially pertinent to this particular situation, namely, that union pressure designed to effectuate the purpose of the hot cargo clause is unlawful and subject to relief under the National Labor Relations Act.

The record and the findings of the Examiners in this case left no doubt that the unionized carriers themselves had no interest in invoking the hot cargo clauses and did so only in response to union pressure and fear of labor difficulties (R. 95). This Court's decision plainly strengthened the position of those carriers who had already refused to yield to union pressure and lent more, rather than less, credence to Examiner Driscoll's conclusion that the other principal unionized carriers would be likely to effectuate their announced policy of interchanging freely with the non-union carriers. In this connection, it is not necessary to determine whether the 1959 amendment of the National Labor Relations Act (29 U. S. C., Sec. 158(e)) will make extremely unlikely, as the Commission suggested in its Motion to Affirm, the recurrence of any such situation as gave rise to the interchange difficulties between the union and non-union carriers. It is true that this amendment was apparently designed to nullify effectively hot cargo clauses such as those involved in the present controversy. But there was no need for the Commission to have been clairvoyant in foreseeing exactly how the labor difficulties would eventually be resolved. All that was required of the Commission was that it be as circumspect as were its Examiners in recognizing that an accurate assessment of the labor situation was beyond their competence and in concentrating instead upon the long run characteristics of the transportation situation which were within their special competence.

The certificating provisions of the Interstate Commerce Act are, of course, designed to achieve a delicate long

range balance between the supply of, and the demand for, transportation services, as accurately measured as the frailties of human judgment will permit. Obviously, these long term objectives will be frustrated if the Commission makes permanent grants of operating authority to remedy the transitory circumstances of complex labor disputes without the most careful evaluation of the controlling transportation considerations. It is because the Commission failed to make such an evaluation in accordance with its responsibilities under the Interstate Commerce Act that it has placed itself in the untenable position of having granted permanent operating authority to remedy a temporary situation which the Commission itself now suggests is unlikely to recur.

Comparison of the circumstances of this case with others relied upon by the government as instances in which the Commission's grant of a certificate of operating authority has been sustained, only serves to emphasize the extent of the Commission's departure herein from the normal standards of its administration of the Interstate Commerce Act. In *United States* v. *Detroit Navigation Co.*, 360 U. S. 236, for example, where this Court sustained the Commission's grant of a certificate to operate as a common carrier by water, the Commission made explicit findings with respect to the need for the applicant's services in the following terms:

> "The record establishes that there was a definite need for applicants' vessels in the transportation of motor vehicles between Detroit and Lake Erie ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also shows with reasonable certainty that there will be a like need for them in that service at the termination of the war or when normal production and shipment by water or motor vehicles for civilian use are resumed. Witnesses representing manufacturers producing the bulk of the

automobiles at Detroit testified as to this need in the future, not only as to transportation between Detroit and Lake Erie ports but also to Lake Superior ports; that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941; and that with the resumption of automobile manufacture the use of applicants' facilities will be necessary in the handling of such traffic. Refusal of applicants' right to initiate such operations with their own vessels might seriously impair their investment in those vessels and while that fact is not controlling, the refusal would according to this record deprive shippers of necessary transportation facilities which would not be in the public interest." (T. J. McCarthy S. S. Co. Common Carrier Application, 260 I. C. C. 175 at 181-182.)

Similarly, in *I. C. C. v. Parker*, 326 U. S. 60, this Court, in response to the contention that there was a "failure of proof as to the convenience and necessity for a new motor truck operation in the territory," summarized the relevant findings of the Commission as follows:

"In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service. Appellants take the position that this precise issue need not be decided in this case. They look upon the application as asking for authority to improve 'an existing service'. We think that it was for a motor service to improve an existing rail service. Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M. C. C. 725-26, we hold that the Com-

> mission had statutory authority and administrative discretion to order the certificates to issue. The public is entitled to the benefits of improved transportation. Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is found not 'unduly prejudicial' to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service." 326 U. S. at 69-70.)

And finally in *Davidson Transfer & Storage* v. *United States*, 42 F. Supp. 215, where the Commission's grant of a certificate to perform a particular type of motor carrier operation was sustained, the Commission in its report examined the adequacy of the existing services of this particular type, and concluded with the following finding:

> "Protestant motor carriers serve a substantial number of large shippers of foods requiring temperature control between Washington and New York City and the limited number of refrigeration units operated by them are in active service. As a matter of fact, four additional units are being built by them to take care of their existing accounts. Other shippers desiring service on small lots between Philadelphia and Washington have been accommodated only when these carriers lack full loads from shippers regularly served by them. Such occasional service has not been sufficient to satisfy the needs of shippers at Philadelphia. The grant of operating authority herein will not deprive existing carriers of an appreciable amount of traffic since applicant will supply a service not presently available." (42 F. Supp. at 218.)

The Report of the Commission in this case will be searched in vain for any comparable evaluation of the adequacy of existing transportation facilities to provide the services required. The most that will be found is a summary of interchange difficulties experienced by some of

the non-union carriers with some of the union carriers, accompanied, however, by affirmative indications that those difficulties were being overcome, by the time of the second hearing, by the existing carriers. In spite of these indications, and without even considering the adequacy of the existing alternatives or the injury to the existing carriers, the Commission undertook to prevent the possible recurrence of such difficulties by certificating a new non-union carrier. It should be noted in passing that the entire efficacy of even this solution depended upon the assumption that the new carrier would be able to insulate itself from the normal vicissitudes of labor controversies—an assumption already contradicted by the records of the National Labor Relations Board.* Thus, in introducing this novel conception of its responsibilities under the Interstate Commerce Act, the Commission ignored the standards of its own statute, while at the same time exposing its naivete in the field of labor relations. Where an administrative agency strays in this fashion from the area of its own special competence, the basic reasons for the principle of judicial deference to administrative expertize cease to have any valid application.

Consequently, both because of the transportation considerations which it ignored, and because of the labor considerations by which it was mistakenly guided, the Commission's decision must be found beyond the scope of its authority and an abuse of its discretion under the Interstate Commerce Act.

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*_Madden_ v. _Local 710, IBT_, U. S. District Court, Northern District of Illinois, Docket No. 61 C 960 (Appendix E, Jurisdictional Statement, p. 188).

II.

THE COMMISSION ORDER WAS ALSO ARBITRARY AND CONTRARY TO THE STANDARDS OF THE STATUTE BECAUSE IT DISREGARDED OTHER MORE APPROPRIATE REMEDIES PROVIDED BY THE INTERSTATE COMMERCE ACT ITSELF, PARTICULARLY SECTION 204(c).

The Commission's decision in this case is all the more inexplicable because it summarily brushed aside, without adequate explanation, the suggestion that the other remedies under the Interstate Commerce Act were more appropriately designed to meet this particular situation, if any remedy at all was required.

The situation which gave rise to the filing of the Short Line applications was admittedly abnormal and solely attributable to a labor dispute. The Commission, in order to relieve the alleged unusual deficiency in service by some but not all of the carriers, granted temporary authority to Nebraska Short Line Carriers, Inc. on December 4, 1956, pursuant to 49 U. S. C. 310a(a). Short Line has been operating under that authority since. This action was sufficient to cope with the abnormal and temporary condition created by the labor situation.* Thus the Commission in one respect exercised the authority granted to it to deal with temporary deficiencies in transportation service.

After granting temporary authority to Short Line, the Commission had still additional powers with which to deal with those carriers which could be proved to have breached

* In recommending the enactment of Section 210a(a) (49 U. S. C. 310a(a)), the Interstate Commerce Commission itself said: "Cases arise, and have been brought to our attention, where urgent need for interstate motor carrier service suddenly develops: * * *

"We believe that the Commission should have power to meet such emergencies by a grant of temporary operating authority, in its discretion and without hearings or other proceedings." S. Doc. No. 154, 75th Cong 3d Sess. 2-3.

their duty to serve the public under their certificates and the Interstate Commerce Act. It will be recalled that Examiner Sutherland, in his final evaluation, concluded that "there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that real parties in interest who are aggrieved by this practice should file a complaint with the Commission under Part II of the Act" (R. 68). The Commission disposed of this suggestion simply by saying: "The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers, does not alter the situation or deprive any carrier of the right to follow the course here chosen" (R. 117).

Of course, the availability of another remedy did not deprive the parties of the right to ask for either remedy or both. But this right of the parties did not relieve the Commission of the obligation to make a rational choice between all the available remedies. The particular findings of the Commission themselves demonstrate that no such rational choice was made. Thus, in rejecting the argument that the organized carriers were justified in yielding to union pressure, the Commission said:

> "The apprehensions of certain of the organized carriers that any opposition to the demands of the union would have resulted in reprisals against them appear greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc., changed its policy against interlining with 'unfair' carriers before the close of the hearings herein without experiencing any difficulty" (R. 16).

The distinction thus drawn by the Commission itself between the unionized carriers who did and did not fulfill their obligations certainly suggested that the more appro-

priate remedy would be the issuance of an order under section 204(c) requiring the defaulting carriers to live up to their obligations, if indeed they had not done so, rather than the certificating of a new carrier to compete with innocent and guilty alike.

This point too was aptly stated by Judge Mercer in his dissenting opinion where he said:

> "I find the suggestion that Burlington, Santa Fe, and the other interstate carriers who continued normal interchange with the stockholder carriers are not affected or injured by the order to be a completely unrealistic concept. As I have previously pointed out the Commission found that these carriers were operating at less than maximum capacity for their equipment and facilities, and that they, along with the other interstate motor carriers had been enjoying the traffic which Short Line sought by its application. The order deprives the guilty and the innocent alike of traffic which they otherwise would enjoy.
>
> I think the evil of the order lies in a simple but very significant fact which both the Commission and the majority of this court overlook, namely, that the basic findings of the Commission's report and the evidence adduced before the hearing examiner are geared to the complaint procedures established by Section 212 of the Act, 49 U. S. C. 312, not to the procedure contemplated by the express provisions of Section 207" (R. 265-266).

The aptness of the alternative remedy is further emphasized by its use by the Commission in comparable situations. Most closely comparable is the decision of the Commission in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957), a complaint proceeding under Section 204(c) of the Act, in which it was asserted that the defendant carriers had "refused to accept certain shipments; tendered to them by complainant at Oklahoma City, Oklahoma, in violation of their common carrier obligations,

the specific provisions of their operating authorities, and the provisions of their published tariffs" (73 M.C.C. at p. 618). The defendant carriers sought to excuse their refusal to accept traffic tendered on the grounds that their actions were "attributable entirely to their obligations under existing contracts with the union which they were forced to sign under duress, that they took all such action as might reasonably have been expected of them to fulfill their common carrier obligations in the situation presented, and that they should, therefore, be excused from such obligations" (73 M.C.C. at p. 624). The Commission rejecting this defense found that such refusals were unlawful, particularly with respect to the failure of such defendants to provide adequate service, to observe just and reasonable practices, and to comply with the provisions of their tariffs lawfully on file with this Commission * * *" (73 M.C.C. at p. 630) and issued an order requiring the defendants to refrain from similar practices in the future. In explanation of its decision, the Commission referred to two earlier decisions, *Planters Nut and Chocolate Co.* v. *American Transfer Co.*, 31 M.C.C. 719, and *Montgomery Ward, Inc.* v. *Santa Fe Trail Transportation Co.*, 42 M.C.C. 212, refusing to accept similar excuses and added this comment:

> "* * * We cite these two reports with approval and reject defendants' contentions that the principles announced are obsolete and must be revised in view of the increasingly prominent role which labor unions have since attained in the transportation industry. We find no basis for the suggestion that the provisions of the act and the duties and obligations of common carriers thereunder are subordinate to requirements of labor unions" (73 M.C.C. at p. 627).

To the extent that some of the appellants in this proceeding somehow failed, as the Commission's report suggests, to offer appropriate resistance to the union demands,

it is difficult to perceive why an order similar to that issued in the *Galveston* case, 73 M.C.C. 617, would not have been equally well-adapted to the needs of the situation. The only explanation offered by the Commission for the difference in treatment between the *Galveston* and the instant case was that "the labor difficulties upon which the cited proceedings was based had, with one minor exception, ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing" (R. 118.) This explanation might have had some relevance if it had been addressed to the relative mootness of the two proceedings. It shed no light on the relative appropriateness of the different remedies applied to the two situations. Furthermore, at the time of the hearing in the present case, it was already apparent, as shown by the findings of the Examiners, that the interchange difficulties were on the wane, as a result of the resistance of some of the stronger carriers. At the time of the decision of the Commission, it should have been equally apparent, thanks to the decision of this Court in the *Local 1967* case, 357 U. S. 93, that the resistance of the carriers would increase rather than diminish and that the interchange difficulties themselves in all likelihood would be completely overcome. Of course, it may be suggested that no matter what legal remedies might be available, there could be no complete assurance that the International Union would not still find ways to embarrass connections between union and non-union carriers. By the same token, there could be no assurance that the newly certificated non-union carrier, Nebraska Short Line, would not encounter union difficulties when it entered the channels of interstate commerce and had to deal directly with unionized terminals and shippers. Again, it may be said that the Commission could not be expected to

foresee that Nebraska Short Line would in fact, as the records of the National Labor Relations Board demonstrate, shortly experience just such difficulties. What past experience did affirmatively indicate was that the only reliable and appropriate remedies for such labor difficulties were those provided by the Labor Act, supplemented by the Commission's insistence that all carriers certificated under the Interstate Commerce Act fulfill their statutory obligations.

Doubtless, it will be suggested in response that all these matters pertain to the exercise of administrative discretion and that the courts should not substitute their judgment for that of the Commission. But as this Court has had occasion to remind this and other administrative agencies, administrative discretion is no excuse for the lack of rational explanation for the course of administrative decisions, and judicial deference is not a liturgy to be mechanically recited and applied whenever the exercise of administrative judgment is questioned, irrespective of the inherent rationality of the explanation offered and its consistency with basic statutory standards and objectives. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80; *Shaffer Transportation Co.* v. *United States*, 355 U. S. 83; *Atlantic Refining Co* v. *Public Service Comm.*, 360 U. S. 378; *American Trucking Association, Inc.* v. *United States*, 364 U. S. 1. In short, judicial deference to administrative expertise, as Judge Henry Friendly has recently so brilliantly demonstrated, should not be conceived as an encouragement to administrative obscurantism and inconsistency, but rather as an accolade to be earned by the reasoned exercise of a peculiarly well-informed judgment. *Friendly, The Federal Administrative Agencies, The Need for Better Definition of Standards, 73 Harv. L. Rev. 863 1055, 1263 (1962).* Because the Commission has yet to offer a rational explanation of why it used its certificating powers to make

a permanent change in the competitive situation in this very substantial area of interstate commerce, instead of remitting the initiators of the application to their more appropriate remedies under the Interstate Commerce Act, the order should be set aside.

CONCLUSION.

We have demonstrated that the Commission has available to it specific remedies with which to cope with temporary and abnormal deficiencies in transportation service in a given area. In addition, by virtue of the complaint provisions of the Act, it has the power to deal with carriers which do not fulfill their obligations under the Act and their certificates of public convenience and necessity. In the instant matter, however, by issuing a permanent certificate of public convenience and necessity to Short Line, the Commission has relied upon peculiar and transitory circumstances to justify the creation of a permanent new competitor for all of the carriers that operate in the area involved. In so doing it has ignored the standards of its own statute while undertaking to resolve the merits of a labor dispute. These actions by the Commission have been, we submit, beyond its jurisdiction and an abuse of its discretion. Therefore the decision of the District Court should be reversed.

Respectfully submitted,

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PROOF OF SERVICE.

I, DAVID AXELROD, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transporation Company, Watson Bros. Transporation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of August, 1962, I served copies of the foregoing Brief of Appellants on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid, to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

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APPENDIX.

Section 204(c), Interstate Commerce Act, 49 U. S. C. 304(c).

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 207(a), Interstate Commerce Act, 49 U. S. C. 307(a).

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a

regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Section 212(a), Interstate Commerce Act, 49 U. S. C. 312(a).

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or

broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Section 210a(a), Interstate Commerce Act, 49 U. S. C. 310a(a).

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.*

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* The Commission has extended Short Lines' temporary authority beyond 180 days and Short Line is still operating pursuant to the temporary authority granted December 4, 1956. The Commission has statutory authority to extend the time under a temporary authority grant: *Pan-Atlantic S. S. Corp.* v. *Atlantic C. L. R. Co.*, 353 U. S. 436 (1957).

Section 8(e), Labor Management Relations Act, 29 U. S. C. 158(e).

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purpose of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.